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Supreme Court, U.S.
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NO. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

v.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Alabama

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BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Due Process Clause permits *res judicata* to bar the re-litigation of taxpayers' constitutional claims that were, or could have been, raised in prior litigation when the same claims are raised in subsequent litigation by taxpayers who, although not parties to the prior litigation, share an identity of interest with the taxpayers in the prior litigation and attempt to prosecute the same cause of action.

2. Whether the Equal Protection Clause permits the Alabama Legislature to authorize Jefferson County to impose an occupational or license tax on those businesses, and only those businesses, not already required to pay such a tax under state law.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Defendant/ Respondent	Edwin A. Strickland Jeffrey M. Sewell Charles S. Wagner
Counsel for Intervenor/ Respondent	Charlie D. Waldrep Thomas L. Stewart Mary H. Thompson William M. Slaughter Robert D. Shattuck, Jr. Richard H. Walston
Counsel for Petitioners	William J. Baxley Joel E. Dillard
Respondents	Jefferson County, Alabama Birmingham-Jefferson Civic Center Authority
Petitioners	Jason Richards Fannie Hill A putative class of taxpayers
Trial Judge	Honorable John Rochester
Supreme Court of Alabama	Honorable Ernest C. Hornsby Honorable Hugh Maddox Honorable Reneau Almon Honorable Janie Shores Honorable J. Gorman Houston Honorable Mark Kennedy Honorable Kenneth Ingram Honorable Ralph Cook Honorable Terry Butts

No other persons are known to have participated directly or indirectly in the appeal of this matter.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. The Petition Is Due to Be Denied in Accordance with Supreme Court Rule 14.5 ... 3

A. The Petition is too carelessly drafted to justify the Court's attention 3

B. The first question sought to be presented is incoherent 4

II. The Questions Presented Were Not Addressed or Decided in the Courts Below ... 4

III. The Decision Below Is Not in Conflict With *Martin v. Wilks* 6

IV. The Lower Court Properly Applied the Well-Established Principles of *Res Judicata* 7

V. The Petitioners' Equal Protection Claims Do Not Present a Close or Unsettled Question Meriting the Court's Attention 9

CONCLUSION 16

TABLE OF AUTHORITIES

Cases — *Page*

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 7

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 10, 14

Bedingfield v. Jefferson County, 527 So.2d 1270 (Ala. 1988) 2, 7, 9, 11

Delta Airlines v. August, 450 U.S. 346 (1981) 5

Estes v. City of Gadsden, 266 Ala. 166, 94 So.2d 744 (1957) 13

Grubb v. Pub. Util. Comm'n of Ohio, 281 U.S. 470 (1930) 9

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 10

Martin v. Wilks, 490 U.S. 755 (1989) 4, 5, 6, 7

McCulloch v. Maryland, 17 U.S. 316 (1819) 12

Poston v. Gaddis, 372 So. 2d 1099 (Ala. 1979) 9

Youakim v. Miller, 425 U.S. 231 (1976) 4

Federal Statutes

Buck Act, 4 U.S.C. § 111 2

Rules of the United States Supreme Court

Rule 14.1(a) 3

Rule 14.1(h) 4, 6

Rule 14.5 3

TABLE OF AUTHORITIES (Continued)

Page

Federal Rules of Civil Procedure

Rule 19 ..... 4, 6

Rule 24 ..... 4, 6

Code of Alabama 1975

§ 40-12-2(c) 11

§ 40-12-2(e) 11

§ 40-12-49 11

Alabama Legislative Acts

Act 406, 1967 Regular Session of the Legislature of Alabama ..... *passim*

Jefferson County, Alabama Ordinances

Ordinance 1120 ..... *passim*

No. 95-386

In The

Supreme Court Of The United States

October Term, 1995

JASON RICHARDS and FANNIE HILL,

Petitioners,

v.

JEFFERSON COUNTY, ALABAMA and BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY'S BRIEF IN OPPOSITION

STATEMENT

As explained in the Statement of the Case set forth in the brief of Respondent Jefferson County, Alabama (the "County"), the instant suit was brought as a class action challenging the validity of an occupation tax levied by the County pursuant to its Ordinance 1120 ("Ordinance

1120"), which was adopted by the County in the exercise of the taxing authority conferred upon the County by Act 406, enacted at the 1967 Regular Session of the Legislature of Alabama ("Act 406"). The Birmingham-Jefferson Civic Center Authority (the "Authority") is a public corporation organized under the constitution and laws of Alabama for the purpose of owning and operating a civic center complex that serves the County and the City of Birmingham.

In a cooperative financing effort for the expansion and improvement of the Authority's civic center complex, the City of Birmingham pledged $3,000,000 per year for 20 years and the County pledged $10,000,000 per year for 20 years to provide a composite source of payment for two series of the Authority's bonds that were issued in 1989. These series of bonds were initially issued in the aggregate amount of $132,380,000 and remain outstanding in the amount of $114,630,000. The moneys pledged by the County for the debt service on the Authority's bonds are to be derived solely from the proceeds of the occupation tax challenged in the instant case, and since the bonds are limited obligations payable solely from the moneys pledged by the County and the City, their source of payment would be legally destroyed if the County's occupation tax is determined to be constitutionally invalid. The Authority's bonds were issued in 1989 after, and in reliance upon, the judgment of the Supreme Court of Alabama in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), which upheld the validity of the occupation tax in a suit by citizens and taxpayers whose cause of action was the same as that now sought to be relitigated by the Petitioners in the instant case.[1] Because

[1]The Authority does not contend that the challenge to the occupation tax by the class of federal employees under the Buck Act, 4 U.S.C. § 111, was or could have been raised in *Bedingfield*.

of the foregoing circumstances and the vital interest of the Authority in upholding the validity of the occupation tax that is the sole source of payment for its bonds, the Authority was allowed to intervene as a defendant in this case.

The Authority, as a Respondent in this case by reason of its status as Defendant-Intervenor below, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Alabama Supreme Court in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Is Due to Be Denied in Accordance with Supreme Court Rule 14.5.

> The failure of a Petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the Petition.

Rule 14.5, Rules of the United States Supreme Court.

A. The Petition is too carelessly drafted to justify the Court's attention.

Implicit in Rule 14.5 is the proposition that the Court will deny a petition for certiorari that is so poorly drafted as to cast serious doubt on the petitioner's willingness or ability to articulate a defined, properly tailored issue and to support its position ably and persuasively. Here, it is evident that the Petition was not the subject of careful consideration or thoughtful attention. Otherwise, the Petition would not: refer to the Supreme "Couty" of Alabama on its cover; ignore the admonition in Rule 14.1(a) that the questions presented "should not be argumenta-

tive;" cite the wrong statute (28 U.S.C. § 1254 instead of § 1257) to invoke the jurisdiction of this Court; or disregard the requirements of Rule 14.1(h) (discussed *infra*). Such carelessness casts serious doubt as to whether the Petitioner ought to be allowed to further occupy this Court's time.

B. The first question sought to be presented is incoherent.

The first question presented by the Petitioners purports to raise an issue involving due process and equal protection. However, the ostensibly pertinent portion of the Petitioner's argument is bereft of any mention of either due process or equal protection. Instead, it inexplicably addresses itself to this Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989). The problem is that the Court did not rely on due process considerations in deciding *Martin v. Wilks*.[2] *Martin v. Wilks* addressed the validity of the so-called "impermissible collateral attack" doctrine. The outcome was governed by the Court's interpretation of Rules 19 and 24, Fed. R. Civ. P.; due process was not an element of the Court's rationale. There is simply no evident connection between the first question purportedly presented and the Petitioners' discussion of *Martin v. Wilks*. The Court, along with the County and the Authority, is left to speculate as to what issue the Petitioners are attempting to raise.

II. The Questions Presented Were Not Addressed or Decided in the Courts Below.

This Court has often referred to, and overwhelmingly followed, its ordinary practice of declining to review issues not addressed, decided or involved in the lower court's consideration of the case. *E.g., Youakim v. Miller,*

[2]Nor did the Court rely on an analysis of *res judicata*. *See infra* at n.4 and accompanying text.

425 U.S. 231, 234 (1976); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981). It is true that the Court, in exceptional cases, has exercised its discretion to address issues not raised in the courts below. It is also true, however, that the Petitioners have not proposed any justification for this Court to deviate from its customary and consistent practice of declining to consider issues neither addressed nor decided by the courts below. Because neither question presented was addressed, decided, or involved in the decisions below, the Petitioners cannot now claim the attention of this Court.

Whatever interpretation this Court assigns to the first question presented by the Petitioners, it is clear that no remotely comparable issue was raised or addressed below. In the court below, the Petitioners never argued that the foreclosure of their claims would violate due process or would be contrary to this Court's holding in *Martin v. Wilks*.

The Petitioners direct their second question presented to the constitutional validity of the occupational tax that is the subject of their complaint. Ironically, the Petitioners went to great pains below to stress that the merits of their equal protection claim were *not* before the Alabama Supreme Court. As is clear from the opinions below, neither the trial court nor the Alabama Supreme Court addressed, much less decided, the merits of the Petitioners' equal protection claim.[3] The only issue reached by either of the courts below was whether the Petitioners' substantive claims were barred under the doctrine of *res judicata*.

[3]Although a court can certainly dispose of claims or issues *sub silentio*, a tacit ruling on substantive issues cannot be inferred when a court holds that the substantive claims raised are barred by *res judicata*.

The Petitioners' failure to raise, in the courts below, either of the questions presented is underscored by their failure to comply with Rule 14.1(h) of the Supreme Court Rules. The Petitioners' statement of the case does not contain any suggestion as to "the stage of proceedings [in the lower courts] at which the federal questions sought to be reviewed were raised," or "the method or manner of raising them and the way in which they were passed upon by those courts," or the "pertinent quotation of specific portions of the record" in which either issue was addressed below.

III. The Decision Below Is Not in Conflict With *Martin v. Wilks*

In order for one decision to be in conflict with another, it is necessary that the two decisions address the same or analogous issues. The lower court's application of *res judicata* cannot conflict with *Martin v. Wilks* because the latter decision was not concerned with *res judicata*. *Martin v. Wilks* involved a challenge by white males to the City of Birmingham's implementation of race- and sex-conscious relief pursuant to a consent decree entered in earlier litigation. The white male plaintiffs were not parties to either the earlier litigation or the consent decree, nor were their interests represented by any such party, making *res judicata* inapplicable. 490 U.S. at 761. Instead, the issue was the validity of the "impermissible collateral attack" doctrine, under which some courts had foreclosed non-party challenges — denominated "collateral attacks" — to court-approved consent decrees under several rationales, none of which involved *res judicata*. In fact, in rejecting the impermissible collateral attack rule,[4]

[4]The Court grounded its decision on two rationales, neither of which implicated due process or *res judicata*. First, the Court interpreted Rules 19 and 24, Fed. R. Civ. P, to conclude that unrepresented non-parties were not obliged to intervene upon pain of subsequent preclusion of their claims. 490 U.S. at 763-65. Second, the Court observed that a voluntary settlement — even one resulting in the entry of a court-approved consent decree — could never extinguish the rights or claims of those not party to the settlement, even if they were parties in the litigation. *Id.* at 768. In other words, *res judicata* was not at issue in *Martin v. Wilks* because the prerequisite of a court-imposed (rather than court-approved) final judgment was not satisfied.

the Court expressly recognized and reaffirmed that a judgment can conclude the rights of non-parties whose interests have been "adequately represented by someone with the same interests who is a party." 490 U.S. at 762 n. 2. Accordingly, to the extent *Martin v. Wilks* applies to this case, it supports the conclusion of the court below.

IV. The Lower Court Properly Applied the Well-Established Principles of *Res Judicata*.

In its brief in opposition, Respondent Jefferson County, Alabama, demonstrates that the holding of the court below is entirely consistent with the state and federal jurisprudence of *res judicata*. To avoid duplication, this Respondent will confine itself to stressing two points. First, "[t]he question of whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719-20 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). The trial court's finding that the Petitioners' interests were represented by the *Bedingfield* plaintiffs was expressly upheld by the Alabama Supreme Court: "The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned — they are essentially identical. The substantial identity of the parties' element of *res judicata* is met here." The

Petitioners offer no reason for this Court to revisit that factual determination.

Second, under the view of this case urged by the Petitioners, the constitutionality of a statute could never be conclusively determined so long as an attorney with his eye on the public purse could find new plaintiffs and new arguments with which to dress up a constitutional challenge that had not succeeded in earlier attempts. State and local governments, as well as their private and corporate citizens, must be able to rely on the courts' decisions concerning the constitutionality and lawfulness of the various statutes governing their affairs. Without a policy of finality, the specter of perpetually re-litigating previously decided statutory and constitutional issues — along with the potential economic catastrophe of reversal — will paralyze the operation of government and public finance. Moreover, repeated challenges to the constitutionality of a statute will result in a needless waste of the courts' time and of the limited resources of public bodies obliged to fend off the interminable challenge of opportunistic litigation.

The doctrine of *res judicata* exists precisely to avoid such debilitating uncertainty by providing finality and repose. *Res judicata* depends for its usefulness and effectiveness upon the recognition (i) that real parties, each with a genuine interest in the controversy, must be trusted with the responsibility of presenting the legal issues to be decided and (ii) that the resulting decision will bind persons who, although not being parties to the litigation, have substantially the same interests as the actual parties insofar as the relevant facts and legal issues are concerned and have a cause of action that is substantially the same as that of the actual parties. If the actual parties have had the full opportunity guaranteed by due process of law to litigate relevant constitutional issues, the results of that litigation must be binding on all other persons

whose interests are so aligned with the actual parties as to be adequately represented.

Moreover, the applicability of *res judicata* cannot be defeated by complaining that the parties to the earlier action — those who had the actual opportunity to litigate on behalf of all similarly situated persons — somehow failed to make the most of their opportunity. The plaintiffs in *Bedingfield* all raised the issue of the validity of the County's occupation tax under the Fourteenth Amendment of the United States Constitution in their respective complaints and in various briefs, but they evidently failed to persuade the Alabama Supreme Court that the issue was sufficiently substantial to warrant discussion. A judgment must be regarded as finally deciding all issues pleaded, even though the judicial opinion fails to address explicitly the disposition of such issue. *Grubb v. Pub. Util. Comm'n of Ohio,* 281 U.S. 470, 477-78 (1930); *Poston v. Gaddis,* 372 So. 2d 1099, 1101 (Ala. 1979). Even if the *Bedingfield* plaintiffs pursued the Fourteenth Amendment argument so unpersuasively as to cause both the trial court and the Alabama Supreme Court to leave it unmentioned, they nevertheless made it an element of their case, and the final decision in *Bedingfield* must be *res judicata* with respect to other taxpayers of Jefferson County who are animated by a subsequent urge to relitigate the same issue.

V. The Petitioners' Equal Protection Claims Do Not Present a Close or Unsettled Question Meriting the Court's Attention.

This Court has many times addressed the equal protection implications of state or local taxing decisions. Over 35 years ago, this Court enunciated principles directly applicable to this case:

> The applicable principles have been often stated and are entirely familiar. . . . The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 525 (1959) (citations omitted). The Court went on to note that "it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts *reasonably can be conceived* that would sustain it." *Id.* at 528 (citations omitted, emphasis added).

The Court has subsequently emphasized the extraordinary latitude granted state government in matters of taxation:

> In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. There is a presumption of constitutionality which can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. . . . The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (citations and internal quotation marks omitted).

The Petitioners attempt to engage the sympathy of this Court by claiming that the County, in Ordinance 1120, has concocted a "cockamamie" exemption scheme that exempts a "bizarre collection" of potential taxpayers from the occupation tax. That characterization presents a distorted and misleading picture of the license tax laws

of Alabama and the legislatively mandated conformity of Ordinance 1120 to those laws. When the interaction of Alabama's general license tax laws, Act 406 and Ordinance 1120 is correctly perceived, it is easy to understand why the Supreme Court of Alabama considered the equal protection validity of the occupation tax to be undeserving of discussion on the two occasions when that issue was before it.[5]

The businesses, occupations and professions subject to license taxation by the State of Alabama fall into two categories: (i) businesses or occupations that pay license taxes to the State that are shared with the counties; and (ii) professions licensed and regulated by an agency of the State which pay a license tax only to the State. Except as otherwise provided by specific sections of the state license code, businesses and occupations in the first category are required by § 40-12-2(c) and § 40-12-2(e) of the Code of Alabama 1975 to pay a license tax to the county that "piggy backs" on the state license requirement and is assessed at a rate equal to one-half of the state license tax. In general, each section of the state license code applicable to a learned or regulated profession imposes only a state license tax and provides explicitly that no license tax or portion thereof shall be paid to any county in the State. For example, Code of Alabama 1975, § 40-12-49 provides that "Each attorney engaged in the prac-

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[5]In *Bedingfield v. Jefferson County, supra,* the validity of the occupation tax under the Fourteenth Amendment of the United States Constitution was raised by the complaint and discussed in the briefs considered by the Alabama Supreme Court, but the issue was not discussed in the Court's opinion. The issue was certified for interlocutory appeal to the Alabama Supreme Court in this case, see Appendix 1 to this brief, but was not discussed because the *sub silentio* resolution of the issue in *Bedingfield* was deemed *res judicata.*

tice of law shall pay an annual license tax to the state, but none to the county."

Act 406 authorized the County to impose a license tax on only those businesses, occupations and professions that paid no license tax to the state. With respect to both categories of state license taxes, it is easy to discern a rational basis for the limitation imposed by the Alabama Legislature. For both categories, the taxing interest of the State is paramount; with one category, the State taxes the activity at twice the rate permitted the County, and with the other category, it retains the entire tax benefit from licensing the activity. By restricting the County to taxing businesses, occupations and professions that were not already taxed by the State, the Legislature asserted the State's interest in protecting the revenue source provided by the pre-existing state license and occupation taxes.

With respect to the learned and regulated professions that pay only a state license tax, the State has an additional interest in protecting them from taxation by the County. The practice of these professions in accordance with standards prescribed by regulatory agencies of the State is essential for the common welfare. The levy of license taxes is part of the State regulatory system applicable to these professions. As Chief Justice Marshall observed in *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819), "the power to tax involves the power to destroy."

Not wishing to be concerned as to whether the County would use a taxing power over regulated professions in a careful and nonabusive manner, the Alabama Legislature in Act 406 simply denied the County the right to tax the learned professions that are taxed exclusively by the State under a licensing arrangement that is part of the State's regulatory system. In adopting Ordinance 1120, the County followed exactly the mandate of the Legislature in Act 406 by uniformly levying the tax on every occupa-

tion that was not excluded from the taxing authority of that act.[6]

The list of so-called "cockamamie" "exemptions" from the occupation tax recited with such righteous indignation in the Petition is nothing more than a list of all the businesses, occupations and professions upon which the Alabama Legislature had already, at various times over a period of more than 60 years and under various circumstances, seen fit to impose business license taxes.[7] Prior to the enactment of Act 406 and Ordinance 1120, all of the "exempted" taxpayers listed by the Petitioners were, in fact, the only taxpayers who paid business or occupation license taxes of any kind in the County. If the idea had occurred to willing counsel, such as those who have initiated this litigation, those taxpayers could have brought the mirror image of this case — an equal protection attack on a putative "exemption scheme" that exempted the very taxpayers now sought to be included in the Petitioners' class.

When any privilege or license tax is levied on any particular business or profession without being imposed on other and different businesses or professions, the businesses or professions left untaxed are "exempted" in the sense that they escape taxation. That kind of exemption, however, does not violate equal protection by discriminating among similarly situated persons who pursue the same business or profession and whose competitive standing would be affected by an uneven tax burden.

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[6]Domestic workers in private homes were exempted under the authority of *Estes v. City of Gadsden,* 266 Ala. 166, 94 So. 2d 744 (1957).

[7]Act 406 does not contain a list of "exempted" occupations by name, as might be erroneously inferred from the Petition. Rather, it defines the occupations covered in the grant of taxing authority as those not already required to pay a license or privilege tax under certain specified statutes.

Rather, it is the kind of exemption that simply reflects a legislative judgment to tax one category of business or professional activity while not taxing others. So long as the tax is not so burdensome as to threaten the economic viability of the taxpayer, or deliberately punitive, or lacking any rational relationship to any legitimate governmental purpose, state legislatures have traditionally been accorded broad discretion under the Fourteenth Amendment to tax the privilege of conducting certain businesses or professions while leaving others unburdened. *See Allied Stores v. Bowers, supra.*

That was, in fact, the case with the citizens of Jefferson County before imposition of the occupation tax pursuant to Act 406 and Ordinance 1120. Physicians, lawyers, engineers and other learned professions, as well as various categories of businesses that had become subject to state business licenses at various times during the evolution of the state's economy, were required to pay license taxes, but other individuals pursuing various occupations and businesses were free from any state or county license tax. In other words, by simply not taxing every business, occupation and profession, the state had arguably created an "exemption scheme" that is logically comparable to the "exemption scheme" which the Petitioners now claim to have been unconstitutionally implemented by Ordinance 1120. Those who belong to the class of citizens now represented by the Petitioners are the beneficiaries of this first "exemption scheme" because they had no license tax burden prior to the adoption of Ordinance 1120. Now that the Petitioners and those they represent have become subject to a license tax — which, in some cases, is levied at a greater rate than the older state-county license taxes — they contend that the taxpayers who previously bore the sole burden of state-county license taxation are the beneficiaries of a new unconstitutional "exemption scheme."

There is clearly no substance to any claim based on this notion of an "exemption scheme." Such a claim amounts to nothing more than an attack on the decision of the Alabama Legislature, in the exercise of its legitimate taxing power, not to levy a uniform license tax at all times on all businesses, occupations and professions. The Petitioners are arguing that if any business, occupation or profession is required to pay a license tax, then all businesses, occupations and professions must be subject to substantially the same license tax. That principle constitutes a novel and dangerous intrusion of substantive equal protection into the taxing power of the state legislature — an intrusion much beyond what has been traditionally deemed appropriate to protect similarly situated persons from discriminatory taxation.

CONCLUSION

Based on the foregoing, the Authority submits that the Petition for Writ of Certiorari is due to be denied on any of several independent grounds.

Respectfully submitted,

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IN THE CIRCUIT COURT FOR JEFFERSON COUNTY

APPENDIX

TENTH JUDICIAL CIRCUIT, ALABAMA

JASON RICHARDS, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	CV 92-3191
JEFFERSON COUNTY, et al.,	)	
	)	
Defendant.	)	
	)	
v.	)	
	)	
BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY,	)	
	)	
Intervenor.	)	

ORDER

This case came on for hearing on Defendants' and Intervenor's REQUEST FOR CERTIFICATION TO APPEAL INTERLOCUTORY ORDER. Defendants Jefferson County and the Birmingham-Jefferson Civic Center Authority urge the Court to certify as appealable under Rule 5, Alabama Rules of Appellate Procedure, that portion of its ORDER of November 17, 1993, denying summary judgment for Defendants on Count 1 and Count 2 of Plaintiff's Complaint. Defendants' summary judgment motion maintained that all four counts of the Complaint, except that portion of Count 1 asserting federal employees' Buck Act (4 U.S.C. § 111) claims, are barred by *res judicata* based upon the decision of the Supreme Court in *Bedingfield v. Jefferson County,* 527 So.2d 1270 (1988). The ORDER granted summary judgment as to Counts 3 and 4 based on the doctrine of *res judicata.* The remain-

ing Count 1 asserts federal employes' Buck Act claims and federal constitutional claims. The remaining Count 2 asserts non-federal employees' federal constitutional claims.

In support of the REQUEST FOR CERTIFICATION to appeal under Rule 5, the parties have informed the Court and the Court hereby finds the following with respect to the Rule 5 requirements.

The Jefferson County occupational tax at issue in this case generates approximately $36,000,000 per year. Ten million dollars of the annual proceeds are pledged for a twenty year period to pay the main component of debt service on bonds of the Birmingham-Jefferson Civic Center authority (the "Civic Center Authority") that are now outstanding in the principal amount of $123,205,000 (the City of Birmingham has pledged $3,000,000 per year to pay the remaining debt service on these bonds).

With respect to class certification there are several hundred thousand putative class members who pay the County occupational tax. However, Defendants rely on employers to withhold and pay the tax and, therefore, Defendants do not have an individual identification by name and address of most of the putative class members.

WHEREFORE, upon due consideration of the foregoing; the purpose and requirements of Rule 5, Alabama Rules of Appellate Procedure; and, the arguments of counsel, it is the OPINION of the Court and the Court thereby finds that the portion of its ORDER denying summary judgment on Counts 1 and 2, except for the federal employes' Buck Act claim, should, as a matter of public interest and exigency, be and hereby is CERTIFIED as immediately appealable in accordance with Rule 5, Alabama Rules of Appellate Procedure. The Court further finds and CERTIFIES as follows:

1. Whether Plaintiffs' claims asserted in Counts 1 and 2 are also barred by the doctrine of *res judicata* is a controlling question of law as to which there is substantial ground for difference of opinion.

2. The Plaintiffs' claims asserted in Counts 1 and 2 also present a controlling question of law, as to which there is substantial ground for difference of opinion, with respect to the issue of whether Act No. 406 enacted by the Legislature of Alabama in 1967 (the statute authorizing the levy of the County's occupation tax), by its terms, denied the Plaintiffs and other citizens similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. Act No. 406 and the general professional licensing laws of the State of Alabama exempt certain professions and occupations from the County's occupation tax and in so doing make certain legislative classifications among the citizens of the County for purposes of levying the tax in question.

3. An immediate appeal from the interlocutory ORDER would materially advance the ultimate termination of the litigation. While the questions herein certified are on appeal, this Court expects to proceed to adjudicate the sole remaining Buck Act claim on behalf of a relatively small class of federal employees who work in the County. The parties have advised the Court that they are not aware of any factual disputes pertaining to the Buck Act claim, therefore, said claim may be decided on cross motions for summary judgment, thereby terminating the litigation in the circuit court.

4. An interlocutory appeal would avoid protracted and expensive litigation. If it is determined by the Rule 5 appeal that Counts 1 and 2 are barred either by *res judicata* or by decision of the equal protection question as a matter of law, both the Defendants and Petitioners' employers in the County would be spared the great cost

and disruption of having to identify and locate and give notice to each of the several hundred thousand class members.

DONE and ORDERED this 17th day of November, 1993.

/s/ John E. Rochester
JOHN E. ROCHESTER, Circuit Judge
Specially Sitting

pc: Edwin A. Strickland
Charles S. Wagner
Jeffrey M. Sewell
Thomas L. Stewart
William J. Baxley
Joel E. Dillard